STATE OF MICHIGAN
SUPREME COURT

Court of Appeals No. 244507

Lower Court No. 2001-000103-CH
Michael E. Dodge, Judge

HOERSTMAN GENERAL CONTRACTING, INC.,	)	SUPREME COURT NO. 126958
Plaintiff/Appellee,	)	
v.	)	
JUANITA REMS HAHN and C. RONALD HAHN,	)	
Defendants/Appellants.	)	

BRIEF ON APPEAL-APPELLANTS

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION

The Michigan Supreme Court has jurisdiction of this appeal pursuant to MCR 7.301(A)(2), MCR 7.302 and the Court's Order Granting Leave to Appeal dated May 12, 2005.

STATEMENT OF QUESTIONS INVOLVED

1. Do the undisputed facts establish that the parties reached an accord and satisfaction as a matter of law?

The Trial Court and Court of Appeals said "No."[1]

Defendants-Appellants say "Yes."

STATEMENT OF FACTS

NATURE OF THE ACTION

This case involves a dispute between a corporate general contractor and the individual defendants who contracted to have extensive remodeling work done on their home for a fixed fee and arose because the contractor was unable or refused to account for the cost of "extras" to the contract ordered by the homeowners. The contractor filed suit for damages and sought foreclosure of its construction lien. The homeowners filed a Counterclaim for the amounts they claimed were overpaid to the contractor. Insofar as relevant to this appeal, in their Answer to the Complaint, the defendants filed an affirmative defense of accord and satisfaction.[2]

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[1] In his written Opinion, the Trial Judge did not mention the accord and satisfaction defense but he entered judgment against Hahns on all their affirmative defenses (Trial Court Opinion; Trial Court's Judgment; A, 1a, 9a).

[2] In its Order Granting Leave to Appeal, this Court limited the issue to whether there was an accord and satisfaction between the parties.

THE PLEADINGS AND PROCEEDINGS

On February 6, 2001, Hoerstman General Contracting, Inc. (hereinafter the "Corporation," "Hoerstman" or "plaintiff"), an Indiana corporation, filed its Complaint against Juanita Rems Hahn and C. Ronald Hahn (hereinafter "Hahn" or "defendant") wherein it sought foreclosure of its construction lien (Count I) and damages for breach of a fixed fee written contract and, for damages pursuant to quantum meruit (Count II) (Plaintiff's Complaint, A, 20a).[3]

On March 5, 2001, the defendants filed their Answer, Affirmative Defenses, and Counterclaim (Case Reg. of Actions; A, 0a). In their Answer, the defendants admitted they had entered into the fixed fee contract attached as Exhibit A to Plaintiff's Complaint, denied they owed plaintiff additional money for the work it performed on their home and asserted they had paid the plaintiff more than they were obligated to pay pursuant to the fixed fee contract.

Among their Affirmative Defenses, the defendants asserted that the parties had reached an "accord and satisfaction" (Hahn's Answer, A, 44a).

Hoerstman filed its Answer to the Hahns' Counterclaim on April 16, 2001, in which it denied that it breached the written contract or that it owed the Hahns any damages as a result of any of the allegations in the Counterclaim (Case Reg. of Actions; A, 0a, 52a).

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[3] "A, ___a" refers to the page(s) in Appellants' Appendix.

A bench trial was held on plaintiff's Complaint and defendants' Counter-claim on April 23, 2002, June 6, 2002, and July 24, 2002. The Circuit Judge rendered his opinion on August 8, 2002 (Case Reg. of Actions; A, 0a); judgment was entered on September 30, 2002 (Case Reg. of Actions; A, 0a) and filed on October 3, 2002. (Trial Court's Judgment; A, 9a).

Based on the written opinion, Hoerstman was granted a net judgment of $26,887.55 ($32,687.55 less a credit to Hahns on their Counterclaim of $5,800.00 to install an ice shield) (Trial Court's Op.; A, 6a,-7a); Hoerstman was granted judgment on all of Hahns Affirmative Defenses and both parties were denied an award of attorney fees (Trial Court's Judgment; A, 9a).

A claim of appeal and cross-appeal were timely filed by the parties. (Court of Appeals Docket Entries; A, 0a). In a *Per Curiam* – Unpublished Opinion, the Court of Appeals reversed the Trial Court's denial of Hahns' Motion for Summary Disposition of plaintiff's lien foreclosure claim and affirmed the decision of the Trial Court in all other respects (Court of Appeals Op.; A, 17a).

Hahn filed a Motion for Reconsideration which was denied by the Court of Appeals by Order dated August 2, 2004 (A, 18a).

Hahn timely filed their Application for Leave to Appeal (Court of Appeals Docket Entry; A, 0a). By Order dated May 12, 2005, this Court granted Hahns' Motion for Leave to Appeal limited to the issue of whether there was an accord and satisfaction between the disputing parties (A, 19a).

SUBSTANCE OF PROOF

Hoerstman is an Indiana corporation.[4] Mark Hoerstman is the president; his wife is the secretary (Tr. ,Vol. I, p. 120; A, 97a; Vol. II, p. 8; A, 120a)[5]. Mark Hoerstman is a licensed contractor in the State of Michigan (Tr., Vol. I, p. 119; A, 96a).

Nita Hahn owned a home in Edwardsburg, Michigan which was damaged by storms in May and August, 1998 (Tr., Vol. II, p. 98; A, 152a).

The Corporation repaired the damage caused by the May storm to the Hahn home for a fixed fee and charged "time and material" for additional work that was requested (Tr., Vol. II, p. 9; A, 121a). The Corporation also drafted and entered into a fixed fee contract with Nita and C. Ronald Hahn to remodel the home after the damage caused by the August storm (Tr., Vol. I, p. 136; A, 103a; Tr., Vol. II, p. 6; A, 119a).

Before submitting a proposal for the remodeling work, the Corporation inspected the home inside and out; measured the existing structure, located the walls, scaled the walls on a drawing and did a print (Tr., Vol. II, pp. 12-14; A, 122a-124a). The Corporation originally proposed to remodel the Hahn home for a fixed fee of $94,495.45 (Tr., Vol. I, p. 134; A, 101a). After some changes, a second remodeling proposal in the amount of $96,100.23 was submitted by the Corporation, was accepted by the Hahns (Tr., Vol. I, p. 136; A, 103a; Plaintiff's Exhibit 16) and resulted in the fixed fee contract that

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[4] Unless indicated to the contrary, the facts are not in controversy.

[5] References to "Tr., Vol. __, p. __" are to the volume and page number of the transcript of the trial testimony.

formed the basis for the remodeling work done by the corporate plaintiff (Tr., Vol. I, pp. 74, 135; A, 94a; 102a; Plaintiff's Exhibit 13; A, 57a).[6]

The fixed fee contract provided that changes to the contractual specifications resulting in extra costs would be performed pursuant to written order and would be charged as an extra to the fixed fee (Plaintiff's Exhibit 13, p. 14; A, 70a).

After the job started, the Corporation's workers discovered the home had brick walls which increased the cost of the job because it required more dumpsters and more labor time to tear out the brick walls (Tr., Vol. I, pp. 138-139; A, 105a-106a). The Corporation allowed $11,370.00 for labor in the fixed fee contract which included all demolition work, framing, siding and trim (Tr., Vol. I, p. 68; A, 93a; Tr., Vol. II, p. 24; A, 128a).

The two (2) rear bedrooms in the Hahn home were not included in the remodeling contract (Tr., Vol. II, p. 139; A, 161a). While installing trusses on the roof, the Corporation's workers fell through the two (2) rear bedroom roofs. The Corporation acknowledged that the Hahns were not responsible for the cost incurred to repair this damage but it did increase the cost of "the job" (Tr., Vol. I, pp. 149-150; A, 112a-113a) and Hoerstman included the cost to replace drywall and electrical in those rooms in his cost sheet (Defendants' Exhibit 45, p. 2; A, 81a).

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[6] In a fixed fee contract, the Corporation agreed to do a job for a set price. Changes typically happen on a job and if it is a simple change, the Corporation will put a fixed charge on it but if the change is more complex, the Corporation charges time and material for it (Tr., Vol. I, pp. 121-122; A 98a-99a). In a time and material contract, the Corporation charges for all labor and material and costs plus a markup (*Id.*). The Corporation's fixed fee contract provided that charges for extras and credits for deletions or downgrades would be handled by an accounting (Tr., Vol. II, p. 22; A, 127a).

The Hahns met with Hoerstman at the job site on May 1 or 2, 1999, upon their return from Florida (Tr., Vol. I, p. 142; A, 108a). The shell of the house was done by this time but the interior walls were missing (Tr., Vol. I, p. 142; A, 108a).[7] The original contract specified carpeting (Plaintiff's Exhibit 13, p. 13; A, 57a; Tr., Vol. I, p. 140; A, 107a). At the May meeting, the Hahns decided to upgrade the flooring to an Armstrong tile or Pergo floor (Tr., Vol. III, p. 17; A, 169a; Tr., Vol. II, p. 117; A, 153a). (Facts controverted) Mark Hoerstman told the Hahns the Pergo floor could not be installed because the concrete floor was not level and would have to be taken out if they wanted the Pergo floor installed. Hoerstman said he would take the concrete out but it would cost more (Tr., Vol. I, p. 142; A, 108a; Tr., Vol. II, p. 17; A, 125a). Ron Hahn agreed to pay the extra charge to have the concrete removed (Tr., Vol. III, p. 17; A, 169a).

Mr. Hahn expected to pay for the additions to the fixed fee contract the way he had paid for them in the past: Mr. Hoerstman would provide an invoice for the extra work and it would be paid (Tr., Vol. III, pp. 11, 81; A, 168a, 173a).[8]

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[7] When they signed the contract, Hoerstman stated that he would have the house substantially completed when the Hahns returned from Florida (Tr., Vol. I, p. 137; A 104a).

[8] The Corporation had contracted with Mr. Hahn for unrelated jobs at his funeral home. Each of these other jobs were done pursuant to a fixed fee contract and on each of them, there were extras ordered which were separately invoiced by the Corporation and Mr. Hahn paid for them (Tr., Vol. I, p. 124; A, 100a; Tr., Vol. II, p. 123; A, 154a; Tr., Vol. III, pp. 5-9; A, 163a-167a; Exhibits 64 -65 and 67).

Pursuant to the fixed fee contract, the Hahns were required to pay for extra charges and to know what they owed for the extras, they had to be given an invoice for them (Tr., Vol. I, pp. 74-75; A, 94a-95a; Tr., Vol. II, p. 44; A, 134a).

In addition to the concrete removal, there were other extras and deletions to the contract which included physical changes and upgrades (Tr., Vol. I, pp. 147a-148a, 151a; A, 110a-111a, 114a). None of these change orders were in writing (Tr., Vol. I, p. 155; A, 116a). All the walls in the home remained basically the same after the changes: one wall had to be moved to accommodate the center dormer that was added as part of the fixed fee contract (Tr., Vol. I, p. 153; A, 115a; Tr., Vol. II, pp. 21-22; A, 126a-127a). As the job progressed, the Corporation submitted invoices to the Hahns for payment pursuant to the pay schedule set up in the fixed fee contract (Tr., Vol. I, pp. 145, 156; A, 109a, 117a; Tr., Vol. II, pp. 32-35; A, 129a-132a; Defendants' Exhibits 36, 37; A, 72a-73a).

In its invoice dated June 29, 1999, the Corporation detailed the fixed fee contract price, payments made, a balance due and charges for extras and credits for deletions as required by the fixed fee contract (Defendants' Exhibits 36, 37; A, 72a-73a; Tr., Vol. II, pp. 34-35; A, 131a-132a). The Hahns paid the Corporation ahead of the contract schedule (Tr., Vol. II, p. 44; A, 134a). Defendants' Exhibit 37 was submitted to the Hahns sometime after June 30, 1999 (Tr., Vol. II, p. 37; A, 133a) and after that, Mr. Hoerstman did not provide the Hahns with invoices showing costs for extras ordered because the costs were "for his benefit" (Tr., Vol. II, p. 78; A, 151a).

The Corporation never provided the Hahns with written change orders; it never provided the Hahns with sworn statements that all laborers and materialmen had been paid; it never provided the Hahns with lien waivers (Tr., Vol. II, p. 67; A, 143a).

When they returned from Florida, the Hahns rented an apartment while the Corporation continued work on their home (Tr., Vol. II, p. 131; A, 155a). When the Corporation asked for the June 30, 1999, payment, Mr. Hahn agreed to pay $30,000.00 of the invoice but required Mr. Hoerstman and the Corporation to commit that they would pay the Hahns' rent if the home was not completed by July 29, 1999 (Tr., Vol. III, p. 31; A, 171a; Defendants' Exhibit 49; A, 91a). The house was not completed at the end of July; the Hahns stayed in the apartment and moved on August 29, 1999. They spent two (2) days at the Hoerstman cottage at Diamond Lake because there was no electricity or plumbing at their home and the apartment lease had expired (Tr., Vol. III, p. 32; A, 172a; Tr., Vol. II, pp. 131-132; A, 155a-156a).

The Hahns moved into the home on September 1, 1999, which had only one (1) electrical outlet hooked up at that time. They lived in the home while construction continued (Tr., Vol. III, p. 26; A, 170a).

The Hahns left for Florida in November, 1999, and at that time asked Mr. Hoerstman for an invoice so they would know what they were paying for. They were not given the invoice (Tr., Vol. II, p. 133; A, 157a).

When they returned from Florida, they met with Mark Hoerstman on December 17, 1999, in his office. Mrs. Hahn expected Mr. Hoerstman to give her an invoice detailing the charges for the extra work his company had done and what he was

charging for it. Instead of the accounting, Mr. Hoerstman gave Mrs. Hahn a cost sheet for the job (Defendants' Exhibit 41; A, 75a). The cost sheet does not show charges incurred due to extras: the cost sheet lists all costs associated with the job (Tr., Vol. II, p. 54; A, 137a). He also gave Mrs. Hahn a list of changes ordered by the Hahns (Defendants' Exhibit 40; A, 74a) but there were no costs assigned to the changes (Tr., Vol. II, pp. 134-135; A, 158a-159a). These documents did not mean anything to the Hahns because they did not show how much the changes cost (Tr., Vol. II, p. 137; A, 160a). The Corporation acknowledged that without dollars being assigned to the list of extras, it was not possible to tell how much they cost (Tr., Vol. II, p. 53; A, 136a).

Even though the Hahns were not given an invoice for the costs of the extras they ordered, they paid the Corporation $7,500.00 on December 23, 1999, and $20,000.00 on December 31, 1999, which brought their total payments on the fixed fee contract and extras to $120,269.88 (Plaintiff's Exhibit 2; A, 56a).

Mr. Hoerstman was having continued discussions with the Hahns about final payment for the job in January, 2000 (Tr., Vol. II, pp. 57-58; A, 138a-139a).

In February, 2000, Mr. Hoerstman faxed a letter to the Hahns which was his attempt to list all the extras on the job with costs assigned to them (Tr., Vol. II, pp. 64-65; A, 140a-141a; Exhibit 44; A, 77a). (Facts in the letter are controverted) As of the date he faxed that letter, he was asking for an additional $16,910.79 which would have paid the account in full and for which he would give Hahn for a final lien waiver (Tr., Vol. II, pp. 66-67; A, 142a-143a).

Mrs. Hahn responded to Hoerstman's request for additional money with her letter to him of March 15, 2000, that included a detailed accounting which showed that the Corporation was owed a balance of $5,144.79 and a check in that amount was enclosed with the letter. In her letter, Mrs. Hahn stated: "If we send you a check for the $5144.79 we will consider this account closed and will not expect discussion of the other * items. We will then expect the lein (sic) waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney." (Defendants' Ex. 45; A, 80a). The check was enclosed with the letter and had the words, "final payment" written on it (Defendants' Exhibits 45, 46; A, 80a, 90a; Tr. Vol. II, pp. 67-69; A, 143a-145a).

The Corporation did not respond to Mrs. Hahn's accounting or letter (Tr., Vol. II, p. 69; A, 145a). Instead, Mr. Hoerstman consulted an attorney because he was concerned about the ramifications of the language in Mrs. Hahn's letter stating that the check would be the final payment, the Hahns considered the account closed; they would not discuss any of the starred items on the accounting and requested the final lien waiver mentioned in Mr. Hoerstman's letter demanding $16,910.78 to settle the account. He was concerned about the effect of the "final payment" language on the $5,144.79 check. The Corporation's attorney lined out the "final payment" language on the check and Mr. Hoerstman then deposited the check in the corporate account (Tr., Vol. II, pp. 67-72; A, 143a-148a). On March 22, 2000, the Corporation credited the Hahns' account with the $5,144.79 payment. (Plaintiff's Exhibit 2; A, 56a).

ARGUMENT

I. THE UNDISPUTED FACTS ESTABLISH THAT THE PARTIES REACHED AN ACCORD AND SATISFACTION AS A MATTER OF LAW.

The Circuit Judge found in favor of Hoerstman on Hahns' accord and satisfaction defense. The Circuit Judge made no finding of fact as to the accord and satisfaction defense. A Trial Court's conclusion of law or factual finding influenced by an incorrect view of the law is reviewed by this Court *de novo*. Walters v. Snyder, 239 Mich. App. 453, 456, 608 N.W.2d 97, 98-99 (2000). The Circuit Judge's findings of fact is reviewed for clear error. MCR 2.613(C).

In its *Per Curiam* Opinion, the Court of Appeals correctly set forth the elements of accord and satisfaction but found that there was not an accord and satisfaction because the words "final payment" written on Hahns' check was not sufficient to inform plaintiff that its acceptance of the check discharged the whole claim. (Court of Appeals Op., pp. 3-4; A, 3a-4a).

In reaching this conclusion, the Court of Appeals ignored the Hahns' letter of March 15, 2000, with the accounting which more fully explained the intent of the "final payment" language on the check and it ignored Hoerstman's testimony at trial which shows conclusively that he understood the ramifications of Hahns conditional tender. When all of the undisputed evidence is considered, it is clear that an accord and satisfaction was reached between the parties.

A. The Accord and Satisfaction Doctrine.

The Michigan Supreme Court and the Michigan Court of Appeals have established a governing rule (which shall herein be referred to as the "Shaw rule") for deciding accord and satisfaction cases. An accord and satisfaction is reached when: (1) the amount of the unliquidated claim is in good faith disputed by the debtor; (2) the debtor tenders a check with explicit and clear conditions accompanying acceptance; (3) the creditor understands the meaning of the conditions accompanying the tender; and (4) the creditor retains/accepts the tender. Shaw v. United Motors Products Co., 239 Mich. 194, 214 N.W. 100 (1927).[9]

The fact pattern in the present case is remarkably similar to that presented in Shaw and the same result should obtain. In the present case, correspondence between plaintiff and defendants asserting and contesting the balance owed on the remodeling contract clearly demonstrates a good faith dispute between the parties regarding an unliquidated claim. Defendants tendered a check to plaintiff with a letter containing explicit conditions stating that if they sent plaintiff a check for what they considered to be their outstanding balance they would: (a) consider their account closed; (b) not expect further discussion

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[9] The Shaw rule was followed by the Michigan Supreme Court in Deuches v Grand Rapids, 240 Mich. 266, 215 N.W. 392 (1927); Eisenberg v. C.F. Bannetfield Oil Co., 251 Mich. 654, 232 N.W. 386 (1930); Puffer v. State Mutual Rodded Fire Ins. Co., 259 Mich. 698, 244 N.W. 206 (1932); Lehaney v. New York Life Ins. Co., 307 Mich. 125, 11 N.W.2d 830 (1943); Lafferty v. Cole, 339 Mich. 223, 63 N.W.2d 432 (1954); Davis & Kramer Bros. Freight Lines, Inc., 373 Mich. 594, 130 N.W.2d 419 (1964); and Omscolite Corp. v. Federal Ins. Co., 374 Mich. 344, 132 N.W.2d 154 (1965). The Shaw rule has also been consistently followed by the Court of Appeals. See: Fuller v. Integrated Metal Technology, Inc., 154 Mich. App. 601, 612, 397 N.W.2d 846, 851 (1986); DMI Design & Mfg., Inc. v. ADAC Plastics, Inc., 165 Mich. App. 205, 210, 418 N.W.2d 386, 388 (1987); Faith Reformed Church of Traverse City v. Thompson, 248 Mich. App. 487, 639 N.W.2d 831, 836 (2001).

about the matter; and (c) expect Hoerstman to provide a lien waiver which Hoerstman said he would do when the account was paid in full. (Defendants' Ex. 44; A, 77a). Defendants also expressly stated that if plaintiff did not find these conditions acceptable, they would resort to legal action. (Defendants' Ex. 45; A, 80a). The check contained the words "final payment" written on it. (Defendants' Ex. 46; A, 90a). Mr. Hoerstman read Hahns March 15, 2000, letter and the "final payment" language on the check. He testified at trial that he knew Hahn claimed the tender was the final payment he was due and he was aware that if he cashed the check, he might not be able to collect any more money from Hahn. Plaintiff then consulted an attorney as to whether he could cash the check without jeopardizing his right to collect the additional amount he claimed was owed which proves that he understood the meaning and import of the conditions accompanying the tender. Finally, it is undisputed that plaintiff deposited the tender into its bank account. (Tr. Vol. II, pp. 67-72, 76; A, 143a-148a, 150a). Based on the undisputed facts in this case, this Court should rule as a matter of law that there was an accord and satisfaction.

B. The Undisputed Facts Prove that All Elements of Accord and Satisfaction Were Met in This Case.

Court analysis of accord and satisfaction is intensely fact-specific, and slightly different fact patterns can yield different results. The facts in this case fit squarely within those patterns found by this Court and the Court of Appeals to have established accord and satisfaction.

In Shaw, creditors "by letter and statement of account" requested an account payment of $1,762.50; debtor replied by letter with a check for $412.50, stating, "The amount herein, $412.50, is in full, in final payment of our account with you." 239 Mich. at 195, 214 N.W. at 101. Creditor received the tender and credited it to debtor's account but then demanded satisfactory settlement. Id. Debtor asked for return of the money if the condition of the tender was not accepted, and the creditor's attorneys responded with a letter stating, "[I]t may be understood that you insist that the cash payment of $412.50 is full payment of the claim of Mr. Shaw . . . however, Mr. Shaw refuses to discharge his entire claim for that sum and we have advised him that he is at liberty to credit the same to the account and sue for the balance due him." Id. Mr. Shaw then sued to recover the balance of the claim.

In its analysis of the lower court decision, the Michigan Supreme Court noted that "the governing rule in this case is based upon the condition accompanying the tender and consequent acceptance of the condition in retaining the money. This required no previous agreement, but rests upon a dispute as to the amount due." Shaw, 239 Mich. at 196, 214 N.W. at 101. (Emphasis added.) The Court stated the rule thusly:

> ". . . The applicable rule of law is, if the tender is in full satisfaction of [***4] an unliquidated claim, the amount of which is in good faith disputed by the debtor, and the creditor is fully informed of the condition accompanying acceptance, an accord and satisfaction is accomplished if the money so tendered is retained; for there can be no severance of the condition from acceptance and it avails the creditor nothing to protest and notify the debtor that the amount tendered is credited on the claim and not accepted in full satisfaction. . ."

Shaw, 239 Mich. at 196, 214 N.W. at 101. The Court in Shaw held on the relevant facts that the creditor's acceptance of the tender was a binding de facto assent and retention of the payment resulted in accord and satisfaction.

The fact pattern in the present case is remarkably similar to that presented in Shaw and the same result should obtain.

1. The claim of Hoerstman was unliquidated and was in good faith disputed by the Hahn.

In Shaw, plaintiffs claimed defendant owed $1,762.50 and by letter and statement of account asked for payment. Defendant replied to plaintiff's by letter enclosing a check for $412.50 and stating it was in final payment of the account. Almost the identical thing happened in this case.

In December, 1999, and January, 2000, the parties discussed how much Hahn owed Hoerstman to pay off their account with it. (Tr., Vol. II, pp. 49, 57-58; A, 135a, 138a-139a). Their discussion culminated in February and March, 2000. In February, 2000, Hoerstman sent Hahn a letter demanding $16,910.79 in full payment of the account and final lien waivers (Defendants' Ex. 44; A, 77a). Hahn, like the defendant in Shaw, responded to Hoerstman by letter dated March 15, 2000, contesting the balance of their account with Hoerstman and providing a detailed accounting justifying what Hahn claimed was due. In Shaw, this Court found the exchange of letters between the parties established a dispute as to the amount of the unliquidated claim. Hahn not only disputed the amount owed Hoerstman but unlike Shaw, provided Hoerstman with a detailed accounting showing what Hahn claimed they owed.

The accord and satisfaction defense is applicable only to cases involving disputed or unliquidated claims. This Court has stated that "the very basis for the operation of the principle of accord and satisfaction would not be present unless some dispute did exist." Davis v. Kramer Bros. Freight Lines, Inc., 373 Mich. 594, 598, 130 N.W.2d 419, 421 (1964). "Unliquidated" is defined as "not previously specified or determined;" an "unliquidated claim" is one in which the amount owed has not been determined. BLACK'S LAW DICTIONARY (8th ed. 2004). Under the law of accord and satisfaction, the term "liquidated"

> . . . generally refers to a claim which the debtor does not in good faith dispute – a claim which is certain as to what, and how much, is due. A claim is not liquidated even if it appears that something is due, unless it appears how much is due. A liquidated claim is one which can be determined with exactness from the agreement between the parties, or by arithmetical process, or by the application of definite rules of law.

Faith Reformed Church of Traverse City v. Thompson, 248 Mich. App. 487, 493, 639 N.W.2d 831, 834 (2001), citing 1 AM. JUR. 2d Accord and Satisfaction, § 7 (2004). Moreover, that a debtor concedes a part of a claim is due does not alter accord and satisfaction; such a claim can still be unliquidated and payment of the conceded amount can furnish consideration for settlement of the whole. Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895). Accord: Lehaney v. New York Life Ins. Co., 307 Mich. 125, 131-132, 11 N.W.2d 830, 832 (1943) (where, as here, there is only one claim, the fact that part of the claim is conceded does not divide the claim; the whole claim is unliquidated citing Long v. Aetna Life Ins. Co., 259 Mich. 206, 242 N.W. 889 (1932)).

The amount owed Hoerstman by Hahn was unliquidated and clearly disputed in good faith. The first element of accord and satisfaction is present.

2. The Hahns tendered a check with explicit and clear conditions accompanying acceptance.

In their letter to Hoerstman of March 15, 2000, Hahn included a detailed accounting showing that they owed Hoerstman a balance of $5,144.79.

In Shaw, the defendant replied by letter to plaintiff's demand for payment of the account by enclosing a check and attaching a condition to its acceptance as follows: "The amount herein, $412.50, is in full, in final payment of our account with you." Plaintiff deposited the payment, credited defendant's account and then informed defendant that the payment was not accepted as full satisfaction of the account. The defendant then requested return of the money but plaintiff refused and filed suit to collect the balance it claimed was due. Shaw, 239 Mich. at 195, 214 N.W. at 101.

Hahn, like the defendant in Shaw, sent Hoerstman a check and attached conditions to its acceptance. Hahn stated in their letter: (a) if we send you a check for the $5,144.79 we will consider the account closed; (b) we will not expect discussion of the other * items; (c) we will expect the lien waiver to be sent[10]; and (d) if all that was not acceptable, then we will have to resort to arbitration. (Defendants' Ex. 45; A, 80a). And Hahn did another thing that was not done in Shaw to make clear what they meant by the conditions attached to their check: they wrote in bold letters "final payment" on the check. (Defendants' Ex. 46; A, 90a).

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[10] The lien waiver is in reference to the final lien waiver Hoerstman described in his February letter demanding $16,910.79 in full settlement. (Defendants' Ex. 44; A, 77a).

Hoerstman knew that Hahns were claiming the $5,144.79 check paid their account in full and he was concerned that if he accepted it, he might not be able to collect the additional money he claimed Hahn owed. At trial, Mark Hoerstman, one of the owners of Hoerstman General Contracting, Inc. was asked about his reaction to Hahns' March 15, 2000, letter (Defendants' Ex. 45; A, 80a) and what he did when he received it and the $5,144.79 check (Defendants' Ex. 46; A, 90a) with the words "final payment" written on it. He said:

> Q. Did you make any, or what did you do with this Exhibit 45 and 46 after you got it and after you reviewed it, take it to anybody?
> A. I took it to a man in Niles, Attorney Murray Campbell.
> Q. And then did you eventually cash the check that was sent with Exhibit 45 and which is Exhibit 46?
> A. I deposited the check.
> Q. Okay. Into your company's account?
> A. Yes.
> Q. Did you mark on the check in any way on the front of it before you deposited it in your account?
> A. No.
> Q. Do you see the words 'final payment' on the front of the check?
> A. I do.
> Q. And that has been lined out, hasn't it?
> A. Correct.
> Q. Who did that?
> A. Mr. Murray Campbell.
> Q. He did?
> A. Yes.
> Q. The letter that was sent to you as Exhibit 45 indicates that this check of five thousand one hundred and forty-five dollars and seventy-nine cents is considered by the Hahns to be final payment, right?
> A. That's what the letter says.
> Q. And because it says that you were concerned about the effect, what effect cashing this Exhibit 46 might have

on your ability to seek additional monies from the Hahns, right?

A. Yes.

Q. That's why you went to Mr. Campbell, right?

A. Correct.

Q. Before you deposited the check into your company's account you say Mr. Campbell drew these lines through the words final payment on the check?

A. Correct.

Q. Did you discuss Exhibit 45 or Exhibit 46 with the Hahns before you went to Mr. Campbell?

A. No.

(Tr., Vol. II, pp. 70-72; A, 146a-148a).

To negate the effect of the conditions attached to the $5,144.79 check, Hoerstman, through his attorney, simply crossed out the "final payment" language. Hoerstman then deposited the check in the corporation's account. (Tr. Vol. II, p. 70; A, 146a). It is clear that Hoerstman could not keep the check, protest the conditions and then seek additional money from Hahn. ". . . for there can be no severance of the condition from acceptance and it avails the creditor nothing to protest and notify the debtor that the amount tendered is credited on the claim and not accepted in full satisfaction . . ." Shaw, 239 Mich. at 196, 214 N.W. at 101.

Hoerstman did not discuss Hahns' March 15, 2000, letter or the $5,144.79 check with Hahns before he talked to his attorney. (Tr. Vol. II, p. 71-72; A, 147a-148a). Obliterating the words "final payment" from the check without Hahns' consent or knowledge does not effect their impact. Deuches v. Grand Rapids Brass Co., 240 Mich. 266, 269, 215 N.W. 392, 394 (1927). Rather, the act of lining out the words "final payment" shows conclusively that Hoerstman and/or his attorney knew the effect these

words had when considered with the conditions set forth in the Hahns' letter of March 15, 2000. (Defendants' Ex. 44; A, 77a). DMI Design & Mfg., Inc. v. ADAC Plastics, Inc., 165 Mich. App. 205, 210, 418 N.W.2d 386, 388 (1987) (affirming summary disposition and noting plaintiff could not plausibly argue it did not know ramifications of defendant's conditional tender because it was clear as shown by plaintiffs' unilateral attempt to negate the condition by modifying defendant's offer of the accord).

Conditions accompanying payment have been found to meet the Shaw test on far less clear language than set forth in Hahns' letter of March 15, 2000, and final payment check. Davis v. Kramer Bros. Freight Lines, Inc., 373 Mich. 594, 130 N.W.2d 419 (1964) (finding an accord and satisfaction as a matter of law where over a three year period plaintiffs disputed the right of the defendant to make deductions from their bi-weekly pay but nevertheless kept the pay checks which itemized the deductions on the check stubs). Omscolite Corp. v. Federal Ins. Co., 374 Mich. 344, 132 N.W.2d 1154 (1965) (language on Federal Insurance Co.'s check stating payment is in full settlement of claim, amounted to an accord and satisfaction); Puffer v. State Mut. Rodded Fire Ins. Co., 259 Mich. 698, 244 N.W. 206 (1932) (insured barred from seeking further money from insurer where insured retained settlement check from insurer which contained a release clause because an accord and satisfaction had been reached noting too that where a claim is disputed acceptance of the undisputed portion discharges the whole debt); Eisenberg v. C. F. Bannetfield Oil Co., 251 Mich. 654, 232 N.W. 386 (1930) (Landlord's acceptance of monthly rental checks for a reduced amount of rent paid after negotiations with tenant and which contained a statement that check was in full payment of monthly

rental constituted an accord and satisfaction); Lehaney v. New York Life Ins. Co., 307 Mich. 125, 130-131, 11 N.W.2d 830, 832 (1943) (insured's acceptance of two settlement checks with notation "in full settlement of all claims . . ." and her knowledge that defendant had refused to pay more as double indemnity amounted to an accord and satisfaction); Lafferty v. Cole, 339 Mich. 223, 227, 63 N.W.2d 432, 434 (1954) (plaintiff's deposit of $500.00 check from defendant after defendant told plaintiff ". . . I will give you this $500 on what you claim, and give you no more. I will pay you no more." amounted to an accord and satisfaction).

Whether a tender by a debtor for less than the amount claimed by the creditor amounts to an accord and satisfaction depends on the conditions which accompany the tender. The conditions must be explicit and clear. The Hahns disputed the amount they owed Hoerstman. They sent Hoerstman a check with "final payment" written on it and in a cover letter told Hoerstman they considered the account closed and expected the final lien waiver referenced in Hoerstman's earlier letter. Hahn also told Hoerstman that they would not expect discussion of the other * items and if that was not acceptable, they would resort to arbitration. (Defendants' Exs. 44, 45, 46; A, 77a, 80a, 90a). Hoerstman knew that if he accepted the "final payment" check from Hahn, he might lose the right to collect additional money from Hahn. Hoerstman consulted an attorney who lined out the "final payment" language on the Hahn check and Hoerstman then deposited the check into the corporate account. (Tr. Vol. II, p. 70; A, 146a).

Hahn attached clear and explicit conditions to their tender. Hoerstman could not unilaterally line out the "final payment" language on the tender, ignore the

conditions in Hahns' March 15, 2000, letter which reinforced the "final payment" language and retain the tender without being subject to the accord and satisfaction defense.

3. Hoerstman understood the meaning of the conditions which accompanied Hahns' check.

Mr. Hoerstman understood that Hahns were stating in their March 15, 2000, letter that the $5,144.79 was their final payment and that if he deposited the check, it might preclude him from collecting any additional money. When he received Hahns' March 15, 2000, letter and check in "final payment" of the account, Mr. Hoerstman did not discuss it with the Hahns. Instead, Mr. Hoerstman consulted an attorney about his right to collect additional money if he kept Hahns' last check. The attorney lined out the final payment language on the check and instructed Mr. Hoerstman to deposit the check. Mr. Hoerstman then deposited the check into the corporation's account. (Tr., Vol. II, pp. 67-71, 76; A, 143a-147a, 150a). The unilateral act of Mr. Hoerstman's attorney of lining out the "final payment" language does not eliminate the condition. Deuches v. Grand Rapids Brass Co., 240 Mich. 266, 269, 215 N.W. 392, 394 (1927).

Like Mr. Shaw, Mr. Hoerstman did not intend his acceptance of the check to be a final payment (Tr., Vol. II, pp. 75-76; A, 149a-150a). Just as Mr. Shaw's attorney advised him to credit the defendant's check to the account and sue for additional money, so too, Mr. Hoerstman's attorney advised him to deposit Hahns' check and this suit ensued.

Once Hoerstman realized the ramifications of Hahns' conditional tender, he was bound by it and he could not modify the conditions and keep the tender. DMI Design & Mfg., Inc. v. ADAC the Plastics, Inc., 165 Mich. App. 205, 210, 418 N.W.3d 386, 388 (1987) (noting that plaintiff knew defendant's intention from reading the settlement language as well as from its own efforts to limit the release by adding the statement that endorsement did not constitute acceptance of the terms and holding that plaintiff's negotiation of the check constituted acceptance of the offer).

The undisputed evidence including Hoerstman's own testimony shows that he understood the clear meaning and effect of the conditional tender of Hahns' last check. Lining out a part of the condition did not lessen its effect. To the contrary, lining out the "final payment" language shows Hoerstman knew the ramifications of Hahns' conditional tender. Id., 165 Mich. App. at 210, 418 N.W.2d at 388.

4. Hoerstman accepted the tender.

The final element of the accord and satisfaction defense has also been met. Hoerstman, on advice of his attorney, deposited the Hahns' "final payment" check into his corporate account. (Tr., Vol. II, pp. 70-71, 76; A, 146a-147a, 150a) with full knowledge of the conditions attached to it. The Corporation credited the additional tender to Hahns' account on March 22, 2000. (Plaintiff's Exhibit 2; A, 56a).

C. This Court Should Rule as a Matter of Law That an Accord and Satisfaction Was Reached in This Case.

Hoerstman testified that he was aware of the ramification that could follow if he cashed Hahns' "final payment" check. He testified that he knew from Hahns' letter of

March 15, 2000, that they were claiming that if he negotiated the final payment check, the Hahns were demanding a final lien waiver and that they considered the account would be closed. The Hahns' letter of March 15, 2000, setting forth the conditions attached to the tendered "final payment" check and the check are not disputed nor is Mr. Hoerstman's admission at trial that he was aware the Hahns were considering their $5,144.79 check as full and final payment on their account. (Tr., Vol. II, pp. 70-72; A, 146a-148a; Defendants' Exhibits 45, 46; A, 80a, 90a). Where, as here, the material facts are not in dispute,[11] this Court can rule as a matter of law that an accord and satisfaction has been reached. MCR 7.361(A)(6) and (7); Urben v. Public Bank, 365 Mich. 279, 286, 112 N.W.2d 444, 447 (1961) ("[Unless] the evidence is insufficient to submit to the jury, or is undisputed and not open to opposing inferences – accord and satisfaction, including the various elements thereof, is a question of fact to be determined by the jury or by the court where it is the trier of facts. . .").

Hoerstman testified that he understood the meaning of the conditions contained in the Hahns' March 15, 2000, letter and the meaning of the words "final payment" written on their check. Given the undisputed facts, this Court can rule as a matter of law that an accord and satisfaction has been reached as has been done in prior cases. Davis v. Kramer Bros. Freight Lines, Inc., 373 Mich. 594, 130 N.W.2d 419 (1964); Fuller v. Integrated Metal Technology, Inc., 154 Mich. App. 601, 614, 397 N.W.2d 846, 851 (1986) (affirming the Trial Court's grant of summary disposition and noting especially

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[11] Of course, if a material fact is in dispute, then the case should be remanded to the Trial Court for resolution. See: Fritz v. Marantette, 404 Mich. 329, 334-335, 273 N.W.2d 425, 427 (1978).

the following undisputed facts: there was a good-faith disagreement; defendant tendered a check with clear conditions; plaintiff testified he knew the meaning of the conditions; plaintiff accepted the tender); DMI Design & Mfg., Inc. v. ADAC Plastics, Inc., 165 Mich. App. at 210, 418 N.W.2d at 388 (affirming summary disposition and noting plaintiff could not plausibly argue it did not know ramifications of defendant's conditional tender because it was clear as shown by plaintiffs' unilateral attempt to negate the condition by modifying defendant's offer of the accord).

1. The failure of the Trial Court to make findings of fact on the issue does not preclude this court from deciding the parties reached an accord and satisfaction.

The Trial Court did not make any findings of fact on the issue of accord and satisfaction but entered judgment against Hahn on their defense of accord and satisfaction. (Trial Court's Op., A, 1a; Trial Court's Judgment, A, 9a). The Court of Appeals did not address this issue but ruled that an accord and satisfaction had not been reached because: "The words 'final payment' written on a check was not sufficient to inform plaintiff that its acceptance of the check discharged the whole claim . . ." (Court of Appeals Op. pp. 3-4; A, 15a-16a).

This Court will not ordinarily substitute its judgment on factual issues for that of the Trial Court. Noyce v. Ross, 360 Mich. 668, 675, 676, 104 N.W.2d 736, 746 (1960).

But, if there is no dispute as to the underlying facts regarding the issue of accord and satisfaction, the Appellate Court can treat the issue as a matter of law. F.G. v. Washtenaw County Circuit Court, 264 Mich. App. 413, 417, 691 N.W.2d 465, 468 (2004); Robinson v. YMCA, 123 Mich. App. 442, 445, 333 N.W.2d 306, 308 (1983).

Moreover, where, as here, the Trial court ruled against Hahn on their accord and satisfaction defense without making findings of fact, the issue on appeal is one of law. Detroit Power Screwdriver Co. v. Ladrey, 25 Mich. App. 478, 483, 181 N.W.2d 828, 831 (1970) (holding that Trial Court's opinion that plaintiff had failed to prove damages was a question of law and, accordingly, the clearly erroneous standard did not apply).

CONCLUSION

The doctrine of accord and satisfaction has been a mainstay in Michigan jurisprudence since 1895 and came into full bloom with this Court's Opinion in Shaw v. United Motors Products Co., 239 Mich. 194, 214 N.W. 100 (1927). It is a favored doctrine because it settles disputes.

The undisputed documentary and testamentary evidence establishes that an accord and satisfaction was reached between the parties in this case. The balance of the account owed Hoerstman was disputed in good faith by Hahn; Hahn by letter and check clearly stated that the check was their final payment and if accepted, their account would be closed and they expected a final lien waiver from Hoerstman. At trial, Hoerstman testified that he understood the meaning of Hahns' letter and check and because of them he was concerned that if he accepted the check, he might be precluded from collecting additional money from Hahn. Nevertheless, after consultation with an attorney, Hoerstman accepted Hahns' conditional tender and although Hoerstman did not agree with the conditional tender, case law with similar but less compelling facts established an accord and satisfaction was reached between the parties as a matter of law when Hoerstman deposited Hahns' check into his corporate account.

RELIEF REQUESTED

The Defendants-Appellants request that this Court reverse the Judgment of the Trial Court and the Opinion of the Court of Appeals as to whether an accord and satisfaction was reached between the parties and, thereafter, remand the case to the Trial Court with instruction to enter Judgment in favor of them on their accord and satisfaction defense; and they request an award for their costs.

Respectfully submitted,

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